UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 27

Docket No. DC-0752-09-0667-I-1

Bonny Berkner,

Appellant,

v.

Department of Commerce,

Agency.

February 18, 2011

Gary M. Gilbert, Esquire, and Kevin L. Owen, Esquire, Silver Spring, Maryland, for the appellant.

Adam Chandler, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision affirming her removal for making inappropriate statements. We DENY the petition for review for failure to meet the review criteria under 5 C.F.R. § 1201.115(d). For the reasons set forth below, we REOPEN the appeal on the Board's own motion pursuant to 5 C.F.R. § 1201.118, and AFFIRM the initial decision as MODIFIED herein.

BACKGROUND

¶2 On April 22, 2009, the agency proposed to remove the appellant, a Geographer with the U.S. Census Bureau, based on a charge of making inappropriate statements. Initial Appeal File (IAF), Tab 5, Subtab 4d. Specifically, the agency charged:

> On Friday, April 17, 2009, [the appellant] met with Franklin Silberstein, Chief Steward, AFGE local 2782, at approximately 12:15 p.m. [regarding her then-pending discrimination complaint.] During that meeting, [the appellant] clearly stated to Mr. Silberstein, "If I get fired, I'll kill myself." [Silberstein] asked [the appellant] not to do that. [The appellant] explained that when [she] kill[s] [her]self, [she] will return and haunt people, perhaps even being born again and getting even that way. [The appellant] also stated that [she] might take others with [her], adding, "Not here, I know where they live."
>
> After Mr. Silberstein asked [the appellant] to not take things into [her] own hands and asked [her] to recant [her] statement, [she] replied, "I recant it, but I will do what I will do. I'll do what I do."

Id. at 1.

¶3 On June 17, 2009, after considering the appellant's oral and written responses to the notice of proposed removal, the deciding official sustained the charge and removed the appellant, effective June 18, 2009. *Id.*, Subtab 4b. The appellant filed a timely Board appeal, asserting, inter alia, that the agency failed to prove that her alleged statements were inappropriate, discriminated against her based on the perceived disability of mental impairment, and removed her in retaliation for her prior protected equal employment opportunity (EEO) activity. IAF, Tab 1; *id.*, Tab 36 at 6-7, 13-17. She maintained that the agency should not have considered her alleged communications with Mr. Silberstein in removing her because the communications were privileged. *See, e.g.*, *id.*, Tab 36 at 18-19.

¶4 In a November 9, 2009 order, the administrative judge denied the appellant's motion in limine to preclude the testimony of Mr. Silberstein, finding that there was no legitimate claim of privileged communications under these

circumstances. IAF, Tab 23. In the initial decision, the administrative judge affirmed the appellant's removal, first finding that the agency proved the charge by preponderant evidence as the appellant did not deny making the statements in question. IAF, Tab 48, Initial Decision at 1, 3-4. The administrative judge further found that the appellant failed to prove her affirmative defense of disability discrimination because she failed to show that the proposing or deciding officials were motivated by any perception regarding a mental impairment suffered by the appellant. *Id.* at 5. He noted that, to the extent that the proposing and deciding officials may have considered the appellant's mental state and behavior and feared the potential consequences of allowing her to continue working with employees she threatened to kill, such consideration was appropriate and cannot be construed as evidence of discrimination. *Id.* at 6. The administrative judge also rejected the appellant's affirmative defense of retaliation, finding that the agency's reliance on the appellant's statements to Mr. Silberstein does not constitute direct evidence of retaliation and that the knowledge of the proposing and deciding officials that the appellant was pursuing an EEO complaint against them, without more, does not constitute indirect evidence of retaliation. *Id.* at 7. The administrative judge further found that the agency established nexus, that the deciding official appropriately considered the aggravating and mitigating factors, and that the penalty of removal was reasonable. *Id.* at 7-10.

¶5 The appellant has filed a timely petition for review, Petition for Review (PFR) File, Tab 1, and the agency has filed a response in opposition, *id.*, Tab 3.

ANALYSIS

The appellant's communications with her union representative were not privileged.

¶6 In her petition for review, the appellant asserts that the administrative judge erred in denying her motion in limine and in finding that her

communications with Mr. Silberstein as her union representative were not privileged. PFR File, Tab 1 at 13-15. The appellant asserts that the Federal Labor Relations Authority (FLRA) has determined that communications between a union representative and a bargaining unit employee are privileged against disclosure to management for purposes of disciplining the employee. PFR File, Tab 1 at 8-9, 16-17 (citing *Department of the Treasury Customs Service and National Treasury Employees Union*, 38 F.L.R.A. 1300, 1308 (1990)). The appellant further asserts that the Board should defer to the FLRA on this issue and should not create a disparity between its own case law and that of the FLRA. PFR File, Tab 1 at 9-10. She thus encourages the Board to hold that "communications between an employee and either an EEO representative or a union representative are privileged and may not serve as the basis for any adverse employment action against the employee." *Id.* at 12-13. She further encourages the Board to extend the FLRA's reasoning to hold that the only party who may waive the privilege is the employee. *Id.* at 8-9, 20-21.

¶7 As discussed more fully below, because we believe that the facts in the instant case do not support the application of a privilege between a union representative and a bargaining unit employee, even as recognized by the FLRA, the Board need not determine whether to establish such a privilege under Board law.[*]

The appellant's communications with her union representative are distinguishable from those held to be privileged under FLRA law.

¶8 Although FLRA decisions are not binding on us, *Fanelli v. Department of Agriculture*, 109 M.S.P.R. 115, ¶ 11 (2008), we have relied upon the FLRA's reasoning in certain contexts, as appropriate, *see, e.g.*, *Smith v. Department of Energy*, 89 M.S.P.R. 430, ¶ 10 (2001). The appellant correctly points out that the

[*] The Board has stated that "evidentiary privileges should not be lightly granted." *See Gangi v. U.S. Postal Service*, 97 M.S.P.R. 165, ¶ 23 (2004).

FLRA has found that the "content or substance of statements made by an employee to [her] Union representative in the course of representing the employee in a disciplinary proceeding" is protected as privileged. *See Customs Service*, 38 F.L.R.A. at 1308 (finding that the agency violated 5 U.S.C. § 7116(a)(1) by requiring a union representative to disclose, under threat of disciplinary action, the content of statements made by an employee); PFR File, Tab 1 at 16-17; *see also* 5 U.S.C. § 7116(a)(1). An agency may not interfere with the confidentiality of such communication unless the right to maintain the confidentiality of the conversations has been waived or some overriding need for the information is established. *Long Beach Naval Shipyard and Federal Employees Metal Trades Council AFL-CIO*, 44 F.L.R.A. 1021, 1038-40 (1992) (finding that conversations between a bargaining unit employee and a union representative constituted protected activity and that the agency violated 5 U.S.C. § 7116(a)(1) by threatening a union representative with disciplinary action for refusing to disclose the content or substance of statements made to him by a bargaining unit employee).

¶9 While the appellant is correct that the FLRA recognizes such a privilege, even the FLRA limits the scope of protection. The FLRA has recognized that an agency's need for information regarding protected conversations may arise in the context of an investigation of employee misconduct. *See, e.g.*, *United States Department of Treasury United States Customs Service Customs Management Center and National Treasury Employees Union*, 57 F.L.R.A. 319 (2001) (finding that the agency established a sufficient need to justify questioning a bargaining unit employee concerning the advice given by a union vice president in light of an allegation that the vice president advised the employee to lie in the course of an earlier investigation). Further, in a case with facts similar to the instant case, the FLRA found that an agency established an extraordinary need to conduct an investigation and question bargaining unit employees regarding an alleged incident at a union meeting following the agency's receipt of a sworn affidavit

from an employee alleging that physical violence had been threatened by one employee against another on the premises. *See Federal Bureau of Prisons Office of Internal Affairs and American Federation of Government Employees*, 53 F.L.R.A. 1500, 1510 (1998).

¶10 Moreover, *Customs Service* and *Long Beach Naval Shipyard*, in which the FLRA recognized as privileged communications between an employee and a union representative, are factually distinguishable from the instant appeal and thus do not establish that the appellant's statements to Mr. Silberstein are privileged. In both *Customs Service* and *Long Beach Naval Shipyard*, the agency was seeking, under the threat of discipline, to *require* disclosure of confidential information that otherwise would be protected, and the union representative objected to being interrogated regarding his conversation with a bargaining unit employee. *See Long Beach Naval Shipyard*, 44 F.L.R.A. at 1039; *Customs Service*, 38 F.L.R.A. at 1308-09. In *Customs Service*, the agency sought to interview a union representative regarding the statements of a union employee, who was charged with dishonest conduct and attempted theft, to the representative concerning the employee's recollection of relevant events. *See Customs Service*, 38 F.L.R.A. at 1301-02. The union representative protested the interview, and the agency cautioned the representative that he was required to disclose information relating to the investigation of the union employee and that he could be subject to disciplinary action if he refused. *Id.* at 1302. Similarly, in *Long Beach Naval Shipyard*, the agency sought to require a union representative to disclose, under threat of disciplinary action, the content of statements made by a union employee to the representative regarding whether the employee was engaged in outside employment during his period of removal. *Long Beach Naval Shipyard*, 44 F.L.R.A. at 1038. The union representative objected to being interrogated concerning his conversations with the union employee. *Id.* at 1039.

¶11 In the instant case, Mr. Silberstein voluntarily reported the appellant's comments to the agency's labor relations department and drafted a memorandum

detailing the conversation. *See* IAF, Tab 5, Subtab 4e. Further, as noted above, the statements in the instant case were analogous to those at issue in *Federal Bureau of Prisons* in which the FLRA found that the agency had an extraordinary need to conduct an investigation. Thus, the instant case is factually distinguishable from those such as *Customs Service* and *Long Beach Naval Shipyard* in which the FLRA has recognized and enforced a privilege protecting communications between a union representative and a bargaining unit employee. Accordingly, the appellant's suggestion that our failure to find her communications privileged in the instant case would create a disparity between the law as applied by the Board and the FLRA is without merit. *See* PFR File, Tab 1 at 9-10.

The appellant's communications are not protected under Board law.

¶12 In asserting that the Board should recognize a privilege for communications between a union representative and a bargaining unit employee, the appellant relies on the Board's decision in *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625 (1999), as evidence that the Board recognizes the importance of confidential communications between an employee and an EEO counselor. In *Daigle*, the agency proposed to remove Mr. Daigle based on, inter alia, a charge of disrespectful conduct toward agency personnel after Mr. Daigle, during an EEO counseling session and in referring to a supervisor, stated that "[i]f I wasn't a sane man, I'd take a weapon and blow the motherfucker's brains out." *Daigle*, 84 M.S.P.R. 625, ¶ 2. In refusing to sustain the charge, the Board stated:

> Given the fact that EEO counseling sessions are a semi-confidential means through which employees complain about the conduct of other agency personnel, *see* 29 C.F.R. § 1614.105, and the fact that complainants are likely to be emotionally distraught when they are reporting perceived discrimination to the EEO counselor, these sessions are one of the contexts in which it is reasonable to afford employees more leeway with regard to their

> conduct than they might otherwise be afforded in other employment situations.

Id., ¶ 6.

¶13 We find a distinction between venting about the actions of a particular supervisor in the course of an EEO counseling session and the appellant's statements that she would kill herself, return to haunt people, and possibly take others with her if the agency removed her. While Mr. Daigle's statements were disturbing, in addition to profane, it was implicit in his statement that he would not actually harm his supervisor as he stated that he would take such actions if he were *not* a sane man. *See id.*, ¶ 2. Mr. Daigle also was clearly venting his frustrations with respect to a particular supervisor as it directly related to his EEO matter as opposed to the appellant's statements threatening suicide and broadly indicating a willingness to harm multiple agency employees, potentially even at their residences, if the agency removed her. Moreover, ignoring or excusing the appellant's statements that she would kill herself and potentially others if she were removed goes far beyond extending employees additional "leeway" in their conduct while speaking with an EEO counselor. Accordingly, the fact that the appellant's inappropriate statements were made during the course of a meeting with her EEO representative does not excuse her inappropriate statements or prevent the agency from relying on such statements in its removal action.

¶14 We acknowledge that we have previously expressed concern with an agency taking an adverse action against an employee on the basis of statements made to medical professionals and employee assistance program (EAP) counselors. *See Larry v. Department of Justice*, 76 M.S.P.R. 348 (1997); *Powell v. Department of Justice*, 73 M.S.P.R. 29 (1997). In *Larry*, the agency charged Mr. Larry with, inter alia, threatening a supervisor based on statements that Mr. Larry made to a psychotherapist in the agency's EAP. *Larry*, 76 M.S.P.R. at 355. The Board found that the agency failed to prove that the appellant made a threat under the elements set forth in *Metz v. Department of Treasury*, 780 F.2d 1001

(Fed. Cir. 1986), because the evidence showed that the appellant made the statements in the course of psychotherapy with the intent to obtain professional treatment for his violent feelings and not with the intent to threaten anyone. *Larry*, 76 M.S.P.R. at 358. Similarly, in *Powell*, the agency charged the appellant with threatening to kill five agency employees based on statements he made in a telephone conversation with an EAP counselor. *Powell*, 73 M.S.P.R. at 32. In considering whether the agency proved its charge under *Metz*, the Board noted that it was "particularly troubled by the agency's use of the appellant's conversation with an EAP counselor as the basis for his removal," reasoning that the agency advertised its EAP as a confidential program where employees could obtain assistance. *Id.* at 35.

¶15 *Larry* and *Powell*, however, are distinguishable from the instant case in important aspects. First, *Larry* and *Powell* both involved threat charges and required analysis under *Metz*. *See Gray v. Government Printing Office*, 111 M.S.P.R. 184, ¶ 11 (2009) (recognizing a distinction between *Powell* and *Larry*, in which the agency was required to prove a threat charge under *Metz*, and a charge of making statements that cause anxiety in the workplace). Here, the appellant was charged only with inappropriate statements. Moreover, the appellant here made her statements to her union and EEO representative, not to a licensed psychotherapist or EAP counselor. *Cf. Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing a federal licensed psychotherapist-patient privilege). Accordingly, we perceive no support in Board case law for finding that the appellant's statements to her union representative were privileged.

The appellant's statements would not be protected under the attorney-client privilege.

¶16 The attorney-client privilege is the oldest privilege recognized for confidential communications at common law and is intended "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration

of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Grimes v. Department of the Navy*, 99 M.S.P.R. 7, ¶ 6 (2005). When considering claims of attorney-client privilege, we have relied on the following elements:

> The privilege only applies if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is (a) a member of a bar of a court, or his subordinate, and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) or assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Grimes, 99 M.S.P.R. 7, ¶ 9 (citing *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)); *Gangi*, 97 M.S.P.R. 165, ¶ 24.

¶17 Applying this standard, even if Mr. Silberstein had been the appellant's attorney, rather than her union and EEO representative, the appellant's communications to him would not have been privileged under the high confidentiality standards imposed under the attorney-client relationship. The appellant's statements that she would kill herself and potentially others if she were removed were not communications made in order to obtain legal advice and fall within the future crime exception to the attorney-client privilege. *See United States v. Alexander*, 287 F.3d 811, 816 (9th Cir. 2002) (holding that a client's threats to harm others, as communicated to his attorney by telephone and letter, were not communications made in order to obtain legal advice, constituted threats to commit future crimes, and were therefore not protected by the attorney-client privilege). Accordingly, the appellant's statements would not have been protected by the attorney-client privilege.

The petition for review fails to establish any error in the initial decision that prejudiced the appellant's rights.

¶18 The appellant has failed in her petition for review to identify any error in the administrative judge's findings that the agency proved that the appellant's statements were inappropriate, that the appellant failed to prove her affirmative defenses of disability discrimination and retaliation for engaging in protected activity, that the agency established a nexus between the appellant's misconduct and a legitimate government interest, and that the penalty of removal is reasonable given the totality of the circumstances. *See* Initial Decision at 4, 8-10. Moreover, any error by the administrative judge in failing to provide legal support for his conclusion that the appellant's communications were not privileged did not prejudice the appellant's substantive rights because the administrative judge properly concluded that the communications were not privileged. Accordingly, there is no basis on which to reverse the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Accordingly, we DENY the appellant's petition for review as it fails to meet the review criteria under 5 C.F.R. § 1201.115(d).

ORDER

¶19 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the

court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.